BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

CITY OF SNOQUALMIE, Petitioner, v. KING COUNTY, Respondent and FUTUREWISE and CITY OF SEATTLE, Amici Curiae.	**Case No. 13-3-0002** ***(Snoqualmie II)*** **ORDER FINDING COMPLIANCE**

On August 12, 2013, the Board issued its Final Decision and Order (FDO) in this case. The Board ruled that the County's adoption of Ordinance Nos. 17485, 17486, and 17487 complied with the Growth Management Act with respect to several of Petitioners' allegations but found noncompliance in one instance and remanded Ordinance 17485 to the County to correct the error. The FDO provided:[1]

> 2. Ordinance No. 17485 fails to comply with RCW 36.70A.110(2) as amended by SHB 1825 because the 2012 CP update in Ordinance 17485 lacks either a revision pursuant to SHB 1825 or an explanation why no revision is needed as required by RCW 36.70A.130(1).
>
> 4. The Board remands Ordinance No. 17485 Attachment A, Introduction and Chapters 1 and 2, and Attachment F, Technical Appendix D, to the County to take the necessary action to achieve compliance as set forth in this Order within 90 days.

[1] Final Decision and Order (August 12, 2013) (FDO), p. 57.

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The FDO established November 12, 2013, as the deadline for the County to take appropriate legislative action. The Board subsequently received the parties' briefs and exhibits as follows:

- Respondent's Statement of Actions Taken to Achieve Compliance, attaching Ordinance 17687(November 5, 2013), Staff Report (September 13, 2013), and Compliance Index – November 22, 2013;
- Petitioner's Objections to Finding of Compliance – dated December 5, 2013;[2]
- Respondent King County's Response to Objections – December 20, 2013.

The Compliance Hearing was convened telephonically January 9, 2014. Present for the Board were Margaret Pageler, presiding officer, and Cheryl Pflug. Board panelist Charles Mosher participated in the hearing by reading the compliance hearing transcript as provided by WAC 242-03-050(2).[3] Petitioner City of Snoqualmie appeared by its attorney Robert Sterbank accompanied by Patrick Anderson.[4] Respondent King County appeared by Deputy Prosecuting Attorney Jennifer Stacey. Mary Ann Pennington provided court reporting services.[5] The hearing provided the Board an opportunity to ask questions clarifying important facts in the case and providing better understanding of the legal arguments of the parties.

I. STANDARD OF REVIEW

After the Board has entered a finding of noncompliance, the local jurisdiction is given a period of time to adopt legislation to achieve compliance.[6] After the period for compliance has expired, the Board is required to hold a hearing to determine whether the local

[2] Through a clerical error, this pleading was first filed with the Attorney General's Office rather than with the Board.
[3] Pursuant to WAC 242-03-050(2), Mr. Mosher reviewed the transcript of the hearing prior to signing the Board's decision.
[4] Mr. Sterbank has filed a notice of appearance and substitution of counsel to serve as attorney for the City in view of Mr. Anderson's December 2013 retirement. Without objection, Mr. Anderson argued for the City at the Compliance Hearing.
[5] The transcript of the Compliance Hearing is referred to herein as "CH Transcript."
[6] RCW 36.70A.300(3)(b).

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jurisdiction has achieved compliance.[7] For purposes of Board review of the comprehensive plans and development regulations adopted by local governments in response to a non-compliance finding, the presumption of validity applies and the burden is on the challenger to establish that the new adoption is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of the GMA.[8]

In order to find the County's action clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made."[9] Within the framework of state goals and requirements, the Board must grant deference to local governments in how they plan for growth.[10] Thus, during compliance proceedings the burden remains on the Petitioner to overcome the presumption of validity and demonstrate that **any action** taken by the County is clearly erroneous in light of the goals and requirements of chapter 36.70A RCW (the Growth Management Act).[11]

The Board reviews the jurisdiction's compliance action to determine compliance with the GMA, not limited to the solutions that may have been suggested in the Board's order:[12]

> The Board has previously explained that a jurisdiction found to be out of compliance with the GMA may achieve compliance through means other than those discussed in the Board's order. [citing *LMI/Chevron v. Snohomish County*, CPSGMHB Case No. 98-3-0012, Order on Compliance (Dec. 20, 1999), at 6; *Screen II v. Kitsap County*, CPSGMHB Case No. 99-3-0012, Order on Compliance (Nov. 22, 1999), at 6.] While the Board's FDO may suggest ways to reword notice or remove inconsistencies, the jurisdiction that seeks to comply may make other choices. The Board presumes that the jurisdiction will act in good faith and reviews the action for compliance with the GMA.

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[7] RCW 36.70A.330(1) and (2).
[8] RCW 36.70A.320(1), (2), and (3).
[9] *Department of Ecology v. PUD1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).
[10] RCW 36.70A.3201.
[11] RCW 36.70A.320(2).
[12] *Petso II v. City of Edmonds*, CPSGMHB No. 09-3-0005, Order Finding Compliance (February 18, 2010), at 5-6. See also, *North Clover Creek II v. Pierce County*, CPSGMHB Case No. 10-3-0015, Final Decision and Order (May 18, 2011), p. 16, and cited cases indicating range of local jurisdiction discretion in action taken to achieve compliance.

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II. DISCUSSION

The Remanded Issue

The FDO found King County's updated 2012 Comprehensive Plan, adopted in Ordinance 17485, failed to respond to legislative amendments to the Growth Management Act adopted in 2009 as SHB 1825. Relevant portions of the ordinance were remanded for the County to "revise or explain why no revision is necessary pursuant to RCW 36.70A. 130(1)."[13]

SHB 1825 made three amendments to the GMA as follows (language added by the Amendments is underlined):

> RCW 36.70A.110(2). Based on the growth management population projection made for the county by the office of financial management, the county and each city within the county shall include areas and densities sufficient to permit the urban growth that is projected to occur in the county or city for the succeeding twenty-year period, except for those urban growth areas contained exclusively within a national historical reserve. <u>As part of this planning process, each city within the county must include areas sufficient to accommodate the broad range of needs and uses that will accompany the projected urban growth including, as appropriate, medical, governmental, institutional, commercial, service, retail and other nonresidential uses.</u>
>
> RCW 36.70A.115. Counties and cities that are required or choose to plan under RCW 36.70A.040 shall ensure that, taken collectively, adoption of and amendments to their comprehensive plans and/or development regulations provide sufficient capacity of land suitable for development within their jurisdictions to accommodate their allocated housing and employment growth, <u>including the accommodation of, as appropriate, the medical, governmental, educational, institutional, commercial, and industrial facilities related to such growth,</u> as adopted in the applicable countywide planning policies and consistent with the twenty-year population forecast from the office of financial management.
>
> RCW 36.70A.210(3). A countywide planning policy shall at a minimum address the following: . . . (g) Policies for countywide economic development and employment, <u>which must include consideration of the future development of commercial and industrial facilities</u>.

[13] FDO Synopsis, at 1.

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In reviewing the County's 2012 comprehensive plan update (2012 CD update) and accompanying record, the Board found no indication that the County had considered the SHB 1825 amendments to the GMA. The FDO explained:[14]

> Turning to the Comprehensive Plan update adopted in Ordinance 17485, the Board notes Snoqualmie has not identified any specific provision of the 2012 CP update which requires revision as a result of SHB 1825, nor has the Board found any. . . .
>
> The County asserts no amendments to its CPs are required by SHB 1825 as Snoqualmie has not identified any policies needing revision. However, RCW 36.70A.130(1) requires that periodic updates of comprehensive plans and development regulations include "a finding that a review and evaluation has been made and identifying the revisions made or that a revision was not needed and the reasons therefor."[15] In adopting the 2012 CP Update, Attachment A to Ordinance 17485, King County performed the required update of its comprehensive plan and included findings to that effect.[16] However, none of the Ordinance findings acknowledge the SHB 1825 amendments, and the Board could find no reference to the new legislative provisions in the relevant sections of the text or policies of the updated Comprehensive Plan. Nor could the Board find reference to SHB 1825 in the section of Ordinance 17485 titled Growth Targets and the Urban Growth Area and adopted as Attachment F Technical Appendix D.
>
> The Board finds the County must articulate how its existing comprehensive plan policies and process comply with SHB 1825 or adopt revisions. The County's failure to revise or explain in the 2012 CP update does not meet the requirements of RCW 36.70A.130(1)[17] as construed by the *Thurston County* court. The Board is left with a definite and firm conviction that a mistake has been made.

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[14] FDO, at 42-43. Footnotes in original.

[15] RCW 36.70A.130(1): "(a) . . . [A] county or city shall take legislative action to review, and if needed, revise its comprehensive land use plan and development regulations to ensure the plan and regulations comply with the requirements of this chapter according to the deadlines in subsections (4) and (5) of this section. (b) . . . Legislative action means adoption of a resolution or ordinance following notice and a public hearing indicating at a minimum, a finding that a review and evaluation has occurred and identifying the revisions made, or that a revision was not needed and the reasons therefor."

[16] Ordinance 17485, Section 1. Findings, at 3-4.

[17] Snoqualmie did not raise non-compliance with RCW 36.70A.130(1) as one of its legal issues and did not cite to that statute in its briefs or argument. However, the City explicitly relied on the "failure-to-revise" holdings of *Thurston County, Gold Star, and Skagit Surveyors.*

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> The Board therefore remands Ordinance 17485, Attachment A, Introduction and Chapters 1 and 2, and Attachment F, Technical Appendix D, to the County to take action to comply with RCW 36.70A.130(1)(a) with respect to SHB 1825.

The County's Compliance Action

King County Ordinance 17687 was adopted to amend the 2012 CP update in response to the FDO. The Ordinance sets forth a finding identifying consideration and revisions pursuant to SHB 1825:

> SECTION 1. **Findings:** The King County council finds that the revisions to the 2012 King County Comprehensive Plan found in Attachments A and B to this ordinance are intended to clarify the county's consideration of the 2009 amendments to the Growth Management Act found in SHB 1825 in its review of the 2012 updates to the Comprehensive Plan.

The Introduction, page I-3, expands description of the Countywide Planning Policies as providing a "framework for housing and job growth targets" to now read "a countywide framework for new development including housing, institutional and other non-residential uses and for job growth."[18] The Staff Report indicates the term "non-residential uses" is used as a short cut for "medical, governmental, educational, institutional, commercial and industrial facilities" as specified in the SHB 1825 amendments to RCW 36.70A.115.[19]

The policy for UGA sizing in the unincorporated area is revised:

> Policy U-115 King County shall provide adequate land capacity for residential, commercial (~~and~~) industrial, and other non-residential growth in the urban unincorporated area.

Technical Appendix D, Growth Targets and the Urban Growth Area, is amended in three places to expand the kinds of uses that must be considered in city and county growth planning and to allow needed expansion of the UGA:

> Page D-3, paragraph 1. Each city within King County is responsible for determining, through its comprehensive plan, land use within its borders, including accommodating the broad range of residential and non-residential uses associated with urban growth.

[18] Staff Report, pp. 2-3, CI000013-14.
[19] Staff Report p. 3, CI000014.

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Page D-3, paragraph 4. As part of the county's planning, it must accommodate housing and employment growth targets, including institutional and other non-residential uses.

Page D-13, paragraph 3. However, in accordance with both county's Comprehensive Plan policies and the Countywide Planning Policies, the Urban Growth Area may be adjusted if a countywide analysis determines that the current Urban Growth area is insufficient in size and additional land is needed to accommodate the housing and employment growth targets, including institutional and other non-residential uses, and there are no other reasonable measures, such as increasing density or rezoning existing urban land, that would avoid the need to expand the Urban Growth Area.

Board Analysis

Pursuant to RCW 36.70A.130(1), cities and counties have a duty to address legislative changes to GMA in their periodic comprehensive plan updates. In the PFR and the proceedings on the merits in this case, Petitioner Snoqualmie did not allege non-compliance with RCW 36.70A.130(1), nor did Snoqualmie identify specific provisions of the County's plan alleged not to comply with SHB 1825. However, because Snoqualmie cited to applicable case law, specifically the "failure-to-revise" holdings of our Supreme Court in *Thurston County v. Western Washington Growth Management Board*, 164 Wn.2d. 329, 190 P.3d (2008); *Goldstar Resorts, Inc. v. Futurewise*, 167 Wn.2d. 723, 222 P.3d 791 (2009); and *Skagit Surveyors & Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 958 P.2d 962 (1998), the FDO allowed a broad reading to Snoqualmie's Legal Issue 1[20] and found noncompliance with RCW 36.70A.130(1). Accordingly, Ordinance 17485 was remanded to the County for revision in response to SHB 1825 or an explanation why no revision was needed.[21]

[20] Issue 1: "Do the challenged actions fail to be guided by GMA Goal 1, RCW 36.70A.020(1), Urban growth, and fail to comply with RCW 36.70A.110(2) *and applicable law by* failing to address the requirement of RCW 36.70A.110(2) as amended by SHB 1825 that each city must have sufficient land capacity to accommodate the broad range of non-residential uses that will accompany its projected urban growth?" (Emphasis added.)
[21] FDO, p. 43: "[T]he County must articulate how its existing comprehensive plan policies and process comply with SHB 1825 or adopt revisions. . . ."

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On compliance, the County adopted Ordinance 17687 (Compliance Ordinance). The Compliance Ordinance adopts a formal finding that the comprehensive plan revisions in the ordinance "are intended to clarify the county's consideration of the 2009 amendments to the Growth Management Act found in SHB 1825 in its review of the 2012 updates to the Comprehensive Plan." This finding is supported by the Staff Report accompanying the ordinance, which states: "[W]ith these KCCP changes, it is the intent of the County to be in compliance with . . . those 2009 amendments found in SHB 1825."[22] With the Compliance Ordinance, King County amended five sections of its Comprehensive Plan to expressly require consideration and accommodation of non-residential uses accompanying urban growth, along with housing and job growth targets, in establishing the urban growth area. Thus the County satisfied the RCW 36.70A.130(1)(b) call for "a finding that a review and evaluation has occurred and identifying the revisions made."

In objection, Snoqualmie points to the second clause of RCW 36.70A.130(1)(b) – "or that a revision was not needed and the reasons therefore." Snoqualmie argues the County's action has not expressly addressed the SHB 1825 provision that "each city . . . must include areas sufficient" for various non-residential uses. The City reads SHB1825 to say that the County needed to make comprehensive plan revisions providing for the County to grant a UGA expansion for various purposes at a city's request, or state why a revision was not needed.

At the heart of the underlying case is a conflict in reading SB 1825. The City reads SHB1825 as obligating a County to expand its UGA at a city's request when the city makes the case that additional commercial or institutional land is "needed" beyond the city's jurisdiction. The City asserts it has an economic need to provide space for development of uses and services which may exist elsewhere within the County UGA or nearby cities but not within *the City's jurisdiction* and that SHB 1825 gives the City such a mandate.[23]

By contrast, the County reads the SHB 1825 amendatory language of RCW 36.70A.110(2) in its statutory context. RCW 36.70A.110 sets forth provisions for Urban

[22] Staff Report, p. 5, CI000016.
[23] FDO, pp. 34-35.

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Growth Areas. Subsection (2) addresses the sizing of UGAs. Based on population projections issued every ten years from the office of financial management (OFM), counties and cities must plan "the areas and densities" needed to accommodate that projected growth. Prior to 2009, counties and cities based their plans on population and employment growth targets, and UGAs were sized to accommodate projected housing and jobs. Subsection (2) was amended in 2009 with an additional sentence requiring cities, "as part of this planning process," to ensure land capacity to accommodate "the broad range of needs and uses" identified "as appropriate" to serve population growth. The County thus reads the amendment as a direction to each city to manage its land use "areas and densities" so that appropriate non-residential uses are accommodated, as well as jobs and housing.

The County also reads the RCW 36.70A.110(2) amendment to be consistent with the parallel amendment to RCW 36.70A.115, which calls on cities and counties to "provide sufficient capacity of developable lands within their jurisdictions" to accommodate projected growth, now also including appropriate institutional and non-residential uses, as well as jobs and housing.[24] The County argues the fundamental GMA principles of coordinating growth and reducing sprawl would be undermined by Snoqualmie's reading of SHB 1825 to allow each city to decide unilaterally to expand the UGA for whatever non-residential uses it wants to accommodate to serve its population.[25]

In the case on the merits, the Board thoroughly reviewed these competing arguments and was not persuaded that the County's application of the statute was clearly erroneous.[26] The Board rejects the City's attempt to re-argue the underlying case on compliance. The

[24] The County's application is also consistent with RCW 36.70A.215 and RCW 36.70A.130(3) which were not amended by SHB 1825 and require accommodation of projected growth within existing urban growth boundaries. RCW 36.70A.215, the buildable lands section, requires King County and its cities to monitor development patterns and take "reasonable measures" to ensure that urban growth occurs in existing urban areas and avoid expansion of UGAs. The buildable lands program "review(s) commercial, industrial and housing needs by type and density range to determine the amount of land needed for commercial, industrial, and housing for the remainder of the twenty-year planning period." RCW 36.70A.215(3)(c). RCW 36.70A.130(3) requires each county to periodically review its UGA designations and permitted urban densities. Each city is required to review, not the size of its UGA, but the "densities permitted within its boundaries." If more capacity is needed to accommodate projected growth, both UGA and density revisions must be considered.

[25] FDO, p. 36.

[26] FDO, pp. 34-36, 38-41.

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Board did not remand for compliance with the City's interpretation of SHB 1825. Rather, the Board's remand was aimed at curing a more procedural defect, requiring the County to fulfill the statutory requirement to document consideration of SHB 1825 as it updated its comprehensive plan.[27] This the County has done with Ordinance 17687.

At the compliance hearing the City clarified its position, saying: "It's not that each city gets to decide," but rather that the County plan must "contain a mechanism, in setting the UGA, to hear out and decide" evidence and argument provided by any city requesting UGA expansion to accommodate non-residential uses.[28] The County objected that the alleged lack of an implementing mechanism is a new argument not raised in the case on the merits.[29] In any event, the County points to the process outlined in Technical Appendix D, Growth Targets and the Urban Growth Area. Here the County's established mechanism for cities to participate in the urban growth analysis is summarized, according to the County, and in fact, "the County is actually working with the cities right now on its next iteration."[30] In this context, the Board concludes Snoqualmie's argument for an additional implementing mechanism lacks merit.

In sum, **the Board finds** the newly-adopted amendments on D-3 and D-13 both (a) expand the category of uses to be accommodated within the UGA and (b) provide flexibility for UGA expansion if appropriate uses cannot be accommodated.[31] These revisions bring the County's 2012 CP update into compliance with the SHB 1825 legislative amendments to RCW 36.70A.110(2) and .115.

Conclusion

The FDO found the County's 2012 CP update "fails to comply with RCW 36.70A. 110(2) as amended by SHB 1825 because the 2012 CP update in Ordinance 17485 lacks either a revision pursuant to SHB 1825 or an explanation why no revision is needed as

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[27] RCW 36.70A.130(1)(b)
[28] CH Transcript, pp. 25-26.
[29] CH Transcript, p. 28.
[30] CH Transcript, p. 29, referencing D-2, CI000061: "King County and its cities compiled land supply, land capacity and density data . . . revised to represent adopted plans and zoning . . . [and] combined with the updated land Demand information from state forecasts, in order to review the size and adequacy of the UGA."
[31] D-3 and D-13, CI000062, CI000072.

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required by RCW 36.70A.130(1)."[32] RCW 36.70A.130(1)(b) provides: "Legislative action means adoption of a resolution or ordinance . . . indicating at a minimum, a finding that a review and evaluation has occurred and identifying the revisions made, *or* that a revision was not needed and the reasons therefor." (Emphasis added)

The Board finds the County's adoption of Ordinance 17687 includes "a finding that a review and evaluation has occurred and identifying the revisions made." **The Board concludes** the County's action **complies** with RCW 36.70A.130(1).

The Board finds Snoqualmie has not met its burden of demonstrating the County failed to comply with the RCW 36.70A.130(1)(b) provision to make a finding "that a revision was not needed and the reasons therefor" with respect to SHB 1825 amendments to RCW 36.70A.110(2). **The Board concludes** the County's action **complies** with RCW 36.70A. 110(2).

III. ORDER

Based upon review of the August 12, 2013, Final Decision and Order, King County's Statement of Actions Taken to Achieve Compliance and Ordinance No. 17687, the Growth Management Act, prior Board orders and case law, having considered the arguments of the parties offered in the briefing and at the compliance hearing, and having deliberated on the matter, the Board ORDERS:

- King County's adoption of Ordinance No. 17687 corrects the deficiencies found in Ordinance No. 17485 and **complies** with the goals and requirements of the GMA as set forth in the Board's August 12, 2013, Final Decision and Order. The Board therefore enters a **finding of compliance** for King County Re: Ordinance Nos. 17485 and 17687.
- GMHB Case No. 13-3-0002, *City of Snoqualmie v. King County (Snoqualmie II)* is **closed**.

[32] FDO, p. 57.

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SO ORDERED this 30th day of January, 2014.

_____
Margaret Pageler, Board Member

_____
Cheryl Pflug, Board Member

_____
Charles Mosher, Board Member

Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.[33]

[33] Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840.
A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.

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